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NOTES.

DOMINANT CORPORATIONS UNDER THE SHERMAN ACT.—The Sherman Anti-Trust Act of 1890[1] was enacted to curb the growing evils of

[1] 26 U. S. Stat. at L. 209. The first two sections of the act provide as follows: § 1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *." § 2. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *." § 4 provides for appropriate proceedings in equity by the government to prevent and restrain violations of the act; § 7 awards triple damages, recoverable in a suit at law, to any person injured in his business through violation of the act; and § 8 enacts that " 'person' shall be taken to include 'corporation' ".

nation-wide monopoly and restraint of trade. In the *Knight Case*,[2] the first important interpretation of the act, its scope was considerably restricted; but that decision has been repeatedly distinguished, disapproved, and even impliedly overruled,[3] so that to-day the act not only covers combinations of interstate carriers and other agents of distribution,[4] but also associations of producers restraining trade among the several States.[5] Since the form assumed by such associations is immaterial, the act condemns combinations in the shape of holding companies,[6] and such as have been formed through the acquisition of a controlling interest in stock of other concerns,[7] as well as pools and trust agreements.[8] Although the courts have steadily maintained that the enactment covers only such acts as have the direct and necessary effect of restraining interstate commerce,[9] it is nevertheless clear that the scope of the term interstate restraint of trade has been considerably extended.

The degree to which restraint of trade concededly interstate is subject to the act, was for many years uncertain, but a test was finally adopted in *Standard Oil Co.* v. *United States*,[10] which ruled that the act condemned only such course of action as exerted an undue restraint, and that the words "restraint of trade" should be interpreted in the light of the common law. The common law would not enforce a covenant restricting competition which gave a more than adequate protection to the covenantee, such contracts being considered in unreasonable restraint of trade, and contrary to public policy as tending to monopoly.[11] Nevertheless, the monopoly resulting from such contracts, or formed in other ways, although denounced as odious, was not criminal at common law,[12] and could be reached only through proceedings by the State to forfeit the charter of the offending corporation on the ground of abuse of its power.[13] Section two of the act endeavors to penalize and restrain such effectuated monopoly, being distinct from

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[2](1895) 156 U. S. 1. This case held that the act had no application to a combination of manufacturers, who had substantially monopolized the business of refining sugar throughout the nation, because their business bore no direct relation to interstate commerce.

[3]See Standard Oil Co. *v.* United States (1911) 221 U. S. 1, 68.

[4]United States *v.* Joint Traffic Assn. (1898) 171 U. S. 505; United States *v.* Trans-Missouri Freight Assn. (1897) 166 U. S. 290.

[5]United States *v.* American Tobacco Co. (1911) 221 U. S. 106.

[6]Northern Securities Co. *v.* United States (1904) 193 U. S. 197.

[7]United States *v.* Union Pacific R. R. (1912) 226 U. S. 61.

[8]The legality of the combination in the State of its creation is no defense. See Northern Securities Co. *v.* United States, *supra;* but see *In re* Greene (C. C. S. D. Ohio 1892) 52 Fed. 104, 112-113.

[9]See United States *v.* Joint Traffic Assn., *supra,* at p. 568; Whitwell *v.* Continental Tobacco Co. (C. C. A. 1903) 125 Fed. 454.

[10]*Supra,* at p. 59; see also United States *v.* American Tobacco Co., *supra.*

[11]Horner *v.* Graves (1831) 7 Bing. 735; see United States *v.* Addyston Pipe & Steel Co. (C. C. A. 1898) 85 Fed. 271, modified and affirmed (1899) 175 U. S. 211.

[12]The mediaeval statutes making criminal the offenses of engrossing, forestalling and regrating, were repealed at an early date. See Standard Oil Co. *v.* United States, *supra,* p. 55; 4 Harvard Law Rev. 128, 137.

[13]State *v.* Standard Oil Co. (1892) 49 Ohio St. 137.

the first section in that it is aimed at results rather than at the methods of attaining such results.[14] Monopolies under the second section, as well as contracts restraining trade, are subject to the "rule of reason",[15] but that rule is from its very nature of indefinite application.

The monopoly or restriction may affect only a limited area and still be invalid,[16] as competition need not be completely suppressed so long as the direct result is to restrain interstate commerce. Since the effects of the combination determine its illegality, there is no necessity of any specific intent to monopolize, and good motives are no excuse.[17] Moreover, since it is the policy of the law to protect individual initiative from strangulation by means deemed unfair,[18] suppression of competition will not be countenanced under the guise of benefit to the public, and the mere fact that prices have remained stationary, or have even been lowered, will not defend a prosecution.[19] It would seem to follow that the possession of power to control prices and stifle competition, characteristic of a corporation of dominant size, makes for illegality, and that the exercise of that power is immaterial.[20] Nevertheless, no decree of dissolution, criminal conviction, or recovery of damages under the statute has been allowed, in the absence of some element of unfair competition[21] either in building up or maintaining the monopoly. In view of the reluctance of the courts to disturb property rights if the defendant has been guilty of no unfair practices, it may be asserted that the mere power to control, inherent in a dominating combination, should not suffice to call the statute into play, if the acts of the defendant show an absence of intent to unduly restrain trade.[22] No reasonable interpretation of the act in the light of our general law justifies the assumption that Congress intended to limit the amount of property a man might acquire by straightforward methods of business.[23]

The case of *United States* v. *International Harvester Co.* (D. C. Minn. 1914) 214 Fed. 987, brought up the question whether a cor-

[14]See Standard Oil Co. *v.* United States, *supra*, p. 61; Thornton, Sherman Anti-Trust Act, § 123.

[15]Standard Oil Co. *v.* United States, *supra*.

[16]Montague *v.* Lowry (1904) 193 U. S. 38.

[17]See Standard Sanitary Mfg. Co. *v.* United States (1912) 226 U. S. 20; State *v.* International Harvester Co. of America (1911) 237 Mo. 369; Chesapeake & Ohio Fuel Co. *v.* United States (C. C. A. 1902) 115 Fed. 610. Intent may, however, become material where the nature of the acts is doubtful. See United States *v.* Reading Co. (1912) 226 U. S. 324, 370.

[18]See United States *v.* Trans-Missouri Freight Assn., *supra*, p. 324; State *v.* International Harvester Co. of America, *supra*.

[19]United States *v.* Chesapeake & Ohio Fuel Co. (C. C. 1900) 105 Fed. 93; United States *v.* Trans-Missouri Freight Assn., *supra*.

[20]See United States *v.* Northern Securities Co. (C. C. 1903) 120 Fed. 721; State *v.* International Harvester Co. of America, *supra*.

[21]For an exposition of the term "unfair competition", see article by William F. Stevens in 29 Political Science Quarterly, 282, 460.

[22]See United States *v.* Standard Oil Co. (C. C. 1909) 173 Fed. 177; United States *v.* American Naval Stores Co. (C. C. 1909) 172 Fed. 455; United States *v.* Reading Co. (C. C. 1910) 183 Fed. 427, modified in the Supreme Court, *supra;* United States *v.* American Tobacco Co. (C. C. 1908) 164 Fed. 700, 721, 722; but see State *v.* International Harvester Co. of America, *supra*.

[23]See 9 Columbia Law Rev. 96.

poration which had acquired, by consolidation, eighty per cent of the business of manufacturing harvesting machinery and certain other farmers' implements, should be dissolved, although prices had not been raised unreasonably by the defendant, and it had acquired its dominant position almost entirely through business efficiency, since no one of the acts designated as unfair competition could be attributed to it for at least seven years past. The court, Sanborn, J., dissenting, ordered a dissolution, on the ground that the suppression of competition between the six large and influential companies of which defendant corporation had been formed, was in unreasonable restraint of trade among the States. The decision can be supported only on the ground that the unlawful acts committed by the defendant, seven years ago, justified the inference of its intent to resume these methods in the future. Size and dominant position may be said to raise a presumption of baneful possibilities, but proof of fair methods, and an intent to continue those methods, inferable from past performances, tends to override such presumption.[24]

PIPE LINES AS COMMON CARRIERS.—A public service company may be created voluntarily or compulsorily: voluntarily, where, as in the case of a common carrier, there is an actual undertaking and holding out to carry on a certain business with all indifferently;[1] compulsorily, where there is no such undertaking, but where the great interests of the public give a particular trade a public character,[2] and so, as Lord Hale said of such trades, they become "affected with a public interest, and they cease to be *juris privati* only."[3] The latter doctrine is of more recent application and has lately found expansion in the case of *German Alliance Insurance Co.* v. *Lewis*.[4]

Legislative control of a public service business may be supported upon the theory either that the particular business owes its existence to governmental sanction,[5] or, on the other hand, that the welfare and great interests of the public make such control imperatively necessary.[6] Apparently, the first prerequisite to a valid exercise of legislative control is that there must exist intercourse with others which is to be the subject of regulation; that is, there must be a business before there can be a

[24]See 25 Harvard Law Rev. 31, 52; United States *v.* St. Louis Terminal (1912) 224 U. S. 383, 395; *cf.* Standard Oil Co. *v.* United States, *supra*, p. 75.

[1]Browne, Carriers, 43; Gisbourn *v.* Hurst (1710) 1 Salk. *249.

[2]See Munn *v.* Illinois (1876) 94 U. S. 113, as a typical illustration of this class. Any business in which there is a virtual monopoly may be said to be of this character. 1 Wyman, Public Service Corporations, §§ 1, 156.

[3]Hargrave's Law Tracts, De Portibus Maris, 78. This dictum formed the basis of the decision in Munn *v.* Illinois, *supra*. The business referred to by Lord Hale was one which existed purely at the sufferance of the crown, and so that decision extends somewhat the application of this dictum.

[4](1914) 233 U. S. 389. In this case, a statute of Kansas providing for the regulation of rates of insurance companies, was sustained as constitutional. See 14 Columbia Law Rev. 534.

[5]See Cooley, Constitutional Law, 262; 1 Tiedeman, State & Federal Control of Persons & Property, 303; Freund, Police Power, §§ 387-388.

[6]*Cf.* Allnutt *v.* Inglis (1810) 12 East *527; Noble State Bank *v.* Haskell (1911) 219 U. S. 104; Freund, Police Power, § 388.